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No. 1203

In the Supreme Court of the United States

OCTOBER TERM, 1969

IN RE DECEMBER 1968 GRAND JURY,
JOHN DI DOMENICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1970. The petition for a writ of certiorari was filed on February 19, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the procedures resulting in the finding of civil contempt in this case denied petitioner due process or the right to counsel.

2. Whether the immunity statute here involved, 18 U.S.C. 2514, is constitutional.

3. Whether petitioner may validly be imprisoned for civil contempt for a period of more than six months.

STATUTES INVOLVED

18 U.S.C. 2514 (Supp. IV) provides:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of this chapter or any of the offenses enumerated in section 2516, or any conspiracy to violated this chapter or any of the offenses enumerated in section 2516 is necessary to the public interest, such United States attorney, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. No such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except in a proceeding described in the next sentence) against him in

> any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

28 U.S.C. 510 (Supp. IV) provides:

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

STATEMENT

Petitioner was adjudged to be in civil contempt in the United States District Court for the Northern District of Illinois, based upon his refusal to give testimony before a grand jury, despite the granting of immunity under 18 U.S.C. 2514 (Supp. IV) (App. 22).[1] The order was affirmed by the court of appeals (Pet. App. 1–5). Application for bail was denied by the court of appeals and thereafter by the Circuit Justice. Petitioner is presently confined in the Cook County Jail.

At 11 a.m. on August 13, 1969, petitioner appeared before the December 1968 grand jury of the Northern District of Illinois. In refusing to answer all questions put to him, he invoked the privilege against self-incrimination. The following day, August 14, petitioner and three other persons who had also invoked the privilege before the grand jury were brought

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[1] "App." refers to petitioner's appendix in the court below, "Pet. App." to the appendix to the petition for certiorari.

before the district court for a grant of immunity under 18 U.S.C. 2514. Government counsel advised the court that the designated representative of the Attorney General, the Assistant Attorney General for the Criminal Division, had approved an application to the court that the witnesses be instructed to testify subject to the provisions of 18 U.S.C. 2514, granting them immunity. The foreman of the grand jury stated that the grand jury joined in this request (App. 6–8). An attorney appeared in behalf of the other three witnesses, but no counsel was present for petitioner (App. 8–14). The court stated that the grant of immunity extended to any prosecution in any court. It explained the procedures to be followed: if immunity were granted, the witnesses would be instructed to return and testify; if they again refused, there would then be a hearing; and "they are entitled to counsel prior to their testimony before the Grand Jury if immunity is granted" (App. 9). After hearing the attorney for the other three witnesses (App. 9–15), the court directed each of the witnesses, including petitioner, to step forward. It explained that pursuant to statute "the Attorney General has authorized and the statute enacted by Congress now gives you complete and absolute immunity from prosecution resulting from any answers to any questions that you may give to this Grand Jury here present" (except, as the judge explained, for perjury) (App. 15–16). The judge then ordered the witnesses to return to the grand jury and "fully and completely answer any and all questions which this Grand Jury or its representatives before it may propound to you" (App. 16). Each witness was

individually asked if he understood the court's order and each, including petitioner, said yes (App. 16).

Petitioner then returned to the grand jury room but again refused to testify.[2] He was immediately returned to the district court. The Clerk recited that this was a "petition to cite John V. DiDomenico for civil contempt of court for failure to obey the Court's order to testify" (App. 16). Government counsel then explained what had occurred before the grand jury, and the transcript of that appearance—including the questions which were asked of petitioner and which he had refused to answer under a claim of privilege—was read in open court (App. 18–20). The district court told petitioner that if he persisted in his refusal to answer these questions, it would have no alternative but to commit him to custody until he did answer (App. 20). Petitioner replied that, although he had earlier been advised that he could secure an attorney he had not then felt that he needed one, but that he now felt that he must confer with an attorney (App. 20–21). The court pointed out that petitioner had been given full opportunity to consult with an attorney, that he had failed to exercise such opportunity, and that the procedures—including the grant of immunity—had been fully explained to him. The court stated that unless petitioner returned and answered the grand jury's inquiries, it would not delay his commitment, but that he could confer with counsel while he was in the custody of the marshal. Petitioner was then

[2] The other three witnesses complied with the court's order and testified (App. 21).

asked if he would return to the grand jury and answer its questions, he replied that he would assert his privilege against self-incrimination (App. 20–21). The court then held him in contempt and committed him to the custody of the marshal, to be confined in jail until he chose to obey the court's order. The marshal was directed to afford petitioner full opportunity "to consult with any attorney that he wishes to call, * * *" (App. 21–22).

ARGUMENT

1. Petitioner was not denied due process in these proceedings. The substance of the immunity granted to him was fully explained by the district court, and petitioner admittedly understood his rights and what was required of him (App. 7–8, 15–16).[3] It is not significant that petitioner was not furnished a copy of the transcript of his questions before the grand jury and his answers thereto. The grand jury reporter, under oath, read these questions and answers to him in open court. It is not claimed that petitioner failed to understand the questions. Moreover, the statute does not require that a transcript be furnished. The further contention that petitioner was denied counsel is negated by his own admission that he had been advised of his right to counsel but declined to exercise it (App. 20–21). In addition, any

[3] We note, moreover, that a copy of the petition for the order of immunity (App. 1–2) was presented to petitioner, although he now complains that it was a "poor quality carbon copy" (Pet. 12).

defect in petitioner's original commitment by reason of the absence of counsel was fully cured four days later upon petitioner's motion, presented by counsel, to vacate the order, which the district court denied (App. 22–23).

2. As the court of appeals held, immunity statutes like 18 U.S.C. 2514 have been upheld as constitutionally valid. See *Ullmann* v. *United States*, 350 U.S. 422; *Brown* v. *Walker*, 161 U.S. 591. In *Carter* v. *United States*, 417 F. 2d 384, petition for certiorari pending, No. 1399 Misc., this Term, the Ninth Circuit found the instant statute to be a valid exercise of congressional authority and a fully effective protection of Fifth Amendment rights.

The Attorney General is specifically empowered by 28 U.S.C. (Supp. IV) 510, *supra* p. 3, to make such provisions as he considers appropriate authorizing the performance of the functions of the Attorney General by other officers of the Department of Justice. The fact that the Attorney General who made the delegation of authority to the Assistant Attorney General to approve applications for immunity is no longer in office is not significant. As the court of appeals pointed out (Pet. App. 4), this power to delegate authority "is made to the office of Attorney General and not to the individual holding that office."

3. Petitioner's confinement is remedial, not punitive. The fact that petitioner, by his own obduracy, has remained in confinement for a period of more than six months does not transform the proceeding for his commitment into a criminal action requiring a jury trial, nor does it convert his continued confine-

ment into cruel and unusual punishment. Petitioner can regain his liberty as soon as he complies with the proper and lawful order of the court. *Shillitani* v. *United States,* 384 U.S. 364; *Bloom* v. *Illinois,* 391 U.S. 194, 209; *Penfield Co.* v. *Securities & Exchange Commission,* 330 U.S. 585, 590; *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 449.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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